The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID WILLIAM TURPEN,

Plaintiff,

vs.

KATHERINE ARQUETTE TURPEN, et al.,

Defendants.

No. 2:22-cv-0496-JCC

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOTED ON MOTION CALENDAR: April 7, 2023

Plaintiff's Motion for Summary Judgment (Doc. 45) should be denied because he has not established that the tribal courts lacked jurisdiction over the Turpens' dissolution of marriage proceeding, nor has established a right to attorney's fees and costs, and for the for the reasons set forth below.[1]

[1] Defendants will file a cross-motion for summary judgment as soon as possible, which will provide Defendants' affirmative arguments supporting the tribal courts' jurisdiction.

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Facts

The facts set forth in Plaintiff's motion are not opposed, but Defendants will assert additional facts in its cross-motion for summary judgment.

Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the case's outcome. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if there is enough evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* at 49. At this stage, evidence must be viewed in the light most favorable to the nonmoving party, and all justifiable inferences must be drawn in the nonmovant's favor. *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011).

Argument

A. State court requirements for jurisdiction over dissolution of marriage proceedings are not applicable to the jurisdiction of tribal courts.

Plaintiff is simply incorrect that the Muckleshoot Tribal Court lacks in rem jurisdiction to dissolve the Turpens' marriage. Pl.'s Mot. at 6–8. His arguments and all the cases he cited relate to the jurisdiction of state courts, which, while perhaps informative, are not directly on point here. The Muckleshoot Tribal Court's assertion of jurisdiction over the dissolution proceeding was authorized by the

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applicable tribal law, and its connection to the Turpens' marital status was equally as grounded as those required under state and federal laws.

Plaintiff argues that in Washington state courts (among others), "a proceeding for dissolution of marriage, or change of marital status, is a proceeding in rem." Pl.'s Mot. at 6. This is generally correct, but inapplicable. He further argues that in rem jurisdiction is generally predicated upon the physical presence of the thing within that court's forum. *Id.* at 7. This is also at least generally correct and also inapplicable. Plaintiff concludes his first argument by claiming, and without citation to any support, that because these general requirements of jurisdiction for state courts were not met, the Tribal Court lacked jurisdiction over the dissolution proceeding. *Id.* This conclusion simply does not follow from Plaintiff's propositions.

Under Muckleshoot law, "[t]he Tribal Court has jurisdiction to dissolve a marriage if one party is a member of the Muckleshoot Indian Tribe. The Court retains jurisdiction to resolve matters pertaining to the dissolution." Muckleshoot Tribal Code 14.01.030; Second Decl. Crable at 9.[2] There is no domicile requirement.

The requirement for domicile or residency in state laws regarding divorce proceedings (among others) is tied to the territorial power of the state courts, and the U.S. Constitution's Full Faith and Credit Clause. U.S. Const. art. IV, § 1. The development of the law in the United States has found that the judicial powers of each state are limited, vis-à-vis other states, by its legitimate interests, and of

[2] Chapter 14.03 of the Muckleshoot Tribal Code, Dissolution of Marriage, is attached to the Second Declaration of Trent Crable filed herewith.

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course its interests are greatest when the issues concern property and people within its borders. *Cf. Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Full Faith and Credit Clause requires the states to recognize and uphold, among other things, the judicial judgments of other states. U.S. Const. art. IV, § 1. While the history of the interpretation of the Full Faith and Credit Clause is long and complex, it is straight-forward as to judgments. Judgments of one state must be recognized and enforced in any other state without challenge or modification *unless* the court that issued the judgment lacked jurisdiction. *V.L. v. E.L.*, 577 U.S. 404, 407 (2016). Thus the court asked to enforce the judgment may consider if the issuing court actually possessed jurisdiction over the matter. *Id.* Such consideration often involves an inquiry into whether the judgment satisfied the requirements of the 14th Amendment's due process clause. *Cf. Hudson v. Hudson*, 35 Wash. App. 822, 836, 670 P.2d 287, 295 (1983). It is in this context that so many state court decisions reference domicile or residence, and neither the Full Faith and Credit Clause nor the 14th Amendment are applicable to tribal courts.

"Tribal authority is inherent in the tribes' retained sovereignty; it does not arise by delegation from the federal government." *United States v. Wheeler*, 435 U.S. 313, 328 (1978)). While state court power is typically territorial, a tribal court's jurisdiction may extend to tribal members not domiciled on the reservation. *Kelsey v. Pope*, 809 F.3d 849, 856 (6th Cir. 2016). The Muckleshoot Indian Tribe has determined that it is in its interest to provide a forum for its tribal members to seek a dissolution of marriage in the Tribe's court system. Under Muckleshoot law, "[t]he

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Tribal Court has jurisdiction to dissolve a marriage if one party is a member of the Muckleshoot Indian Tribe. The Court retains jurisdiction to resolve matters pertaining to the dissolution." Muckleshoot Tribal Code 14.01.030; Second Decl. Crable at 9. There is no domicile requirement. The Supreme Court has explained that:

> [e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.

Williams v. North Carolina, 317 U.S. 287, 298–99 (1942). While a state's interest in the marriage of a nonresident may be limited, especially vis-à-vis the interest of other states, a tribe's interest in its members is not so limited. The Muckleshoot Indian Tribe, in the Domestic Relations chapter of its code, found that:

> . . . as a sovereign native nation, the Tribe's inherent authority to decide matters relating to family relations is an integral part of Tribal self-governance and of the Tribe's history and culture. It is exceedingly important to the Tribe to ensure the safety and vitality of families because doing so promotes the safety and vitality of the Tribe itself.

Muckleshoot Tribal Code 14.01.020; Second Decl. Crable at 8.[3]

Plaintiff's first and second arguments focus entirely on the requirements for state court jurisdiction over dissolution proceedings, Pl.'s Mot. at 6–8, and as such

[3] Chapter 14.01 of the Muckleshoot Tribal Code, General Provisions of the Domestic Relations Code, is attached to the Second Declaration of Trent Crable filed herewith.

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have little to no bearing on whether the Muckleshoot Tribal Court has jurisdiction over the Turpens' dissolution proceeding. As described above, the Tribe does indeed have an interest in the marital status of its members regardless of domicile, interests not typically afforded states. For these reasons, and those explained above, Plaintiff has not shown the Tribal Court lacked jurisdiction over the dissolution proceeding, and his motion should be denied.[4]

B. Plaintiff waived service of process in the tribal court proceedings.

Service of process of a lawsuit initiated in the Muckleshoot Tribal Court is governed by Muckleshoot Tribal law. Tribal Code 3A.02.030; Second Decl. Crable at 13.[5] Muckleshoot Tribal Courts' interpretation of tribal law is binding on this court. *See Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988).

The Tribal Court concluded that Plaintiff had waived service and was equitably estopped from asserting any defect in service by reason of his actions.[6] Second Decl. Crable at 19. First, he "never denied receiving the Petition for Dissolution and the summons." *Id.* Second, he sought affirmative relief, some of which was granted, and he engaged in mediation. *Id.* The Court of Appeals affirmed the Tribal Court, reasoning that:

> He was served in a manner of his choosing, designed to get him as much information as quickly as possible and he appeared, argued and won in

[4] Defendants do not claim that the Tribal Court's powers in a dissolution proceeding are unlimited as to a nonmember spouse.
[5] Chapter 3A.02 of the Muckleshoot Tribal Code, Commencing an Action and Service of Summons and Other Documents, is attached to the Second Declaration of Trent Crable filed herewith.
[6] The opinion of the Tribal Court and the opinion of the Muckleshoot Court of Appeals are attached to the Second Declaration of Trent Crable filed herewith.

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> contested hearings and took part in mediation which indicates he waived any peculiarities in the service of process upon him.

Id. at 23.

Plaintiff has not shown the Tribal Court lacked personal jurisdiction because he waived service. Plaintiff's citation to state law and rules do not support his conclusion that the Muckleshoot Tribal Court lacked personal jurisdiction. Neither were relied upon by the Tribal Court or are otherwise relevant here. Moreover, Plaintiff's conduct would constitute a wavier under Washington State caselaw. *See Lybbert v. Grant County*, 1 P.3d 1124, 1129–30 (2000) (Recognizing the doctrine of waiver of the affirmative defenses of insufficient service of process if defendant's assertion of the defense is inconsistent with the defendant's previous behavior or if he was dilatory in asserting the defense.) Thus, his motion should be denied.

C. Plaintiff is not entitled to an award of attorney's fees and costs and even if he were, sovereign immunity and judicial immunity bar such an award.

Plaintiff has not shown the Tribal Court lacked jurisdiction over the dissolution proceeding and therefore is not entitled to an award of attorney's fees and costs. He is also not entitled to an award of attorney's fees and costs because the Defendants possess tribal sovereign immunity and that immunity has not been waived. Additionally, the Defendant Tribal Court Judges possess judicial immunity that bars any monetary award.

It is well established that Indian tribes possess common-law immunity from suit absent a clear, unequivocal waiver. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436

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U.S. 49, 52 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *E.E.O.C v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001); *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). The courts have repeatedly stressed the important policy concerns underlying tribal immunity: protection of tribal assets, preservation of tribal cultural autonomy, and promotion of self-government. *See Potawatomi Indian Tribe*, 498 U.S. at 510.

The Ninth Circuit has described the sovereign immunity of Indian tribes as more analogous to that of the federal government rather than to the various states under the Eleventh Amendment. *See e.g.*, *Quechan*, 595 F.2d 1153; *Sekaquaptewa v. MacDonald*, 591 F.2d 1289, 1291 (9th Cir. 1979). Tribal immunity has been extended to tribal officials and employees acting in their official capacity and within the scope of their duties. *Sekaquaptewa*, 591 F.2d at 1291; *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968); *see also Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mt. Apache Tribe*, 779 F.2d 476 (9th Cir. 1985).

Here the Defendant Muckleshoot Tribal Court is a branch of the Muckleshoot Indian Tribe and the Defendant Tribal Court Judges are tribal officials acting within their official capacity and within their scope of duties. Plaintiff has not and cannot demonstrate a clear unequivocal waiver of tribal sovereign immunity and any award of attorney's fees and costs is barred.

It is also well established that judges, including tribal court judges, are absolutely immune from liability for "their judicial acts, even when such acts are in

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excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Sadoski v. Mosely*, 435 F.3d 106, 1079 (9th Cir. 2006); *Acres Bonusing, Inc., v. Marston*, 17 F.4th 901, 915 (9th Cir. 2021), cert. denied sub nom. *Acres Bonusing, Inc. v. Martson*, 213 L.Ed. 2d 1065, 142 S.Ct. 2836 (2022) (citing *Penn v. United States*, 335 F.3d 786, 789 (8th Cir. 2003).

Judicial immunity is overcome in two circumstances. The first is when a judge takes nonjudicial actions. Here, all of the actions of the Defendant Tribal Court Judges alleged in the Complaint are unquestionably judicial acts. Pl.'s Mot. at 3–5.

The second circumstance where judicial immunity is overcome is when the judge's action is taken in "clear absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12 (1991); *Ashelman v. Poe*, 793 F.2d 1072 (9th Cir. 1986). The scope of a judge's jurisdiction is broadly construed because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction." *Stump*, 435 U.S. at 356 (quoting *Bradly v. Fisher*, 80 U.S. 335 (1871)).

The Supreme Court has provided the following illustration:

> if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

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Stump, 435 U.S. at 357 n.7 (quoting *Bradly*, 80 U.S. at 352). The focus of the analysis is whether the judge was acting clearly beyond the scope of subject matter jurisdiction. *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986).

The Ninth Circuit provided additional guidance in *O'Neil v. City of Lake Oswego*. 642 F.2d 367 (9th Cir. 1981). There, the Ninth Circuit explained that a court that does not comply with all of the requirements of a statue conferring jurisdiction because of a mistake has discharged its authority imperfectly. 642 P.2d at 369–370. In *O'Neil*, the defendant judge had mistaken the bench warrant for a charge of contempt of court and entered a guilty finding without the statutorily required affidavit. *Id*. The Ninth Circuit concluded that the defendant judge had merely acted in excess of jurisdiction and was entitled to judicial immunity. *Id*. at 368–69.

Plaintiff has not and cannot meet the high burden to overcome judicial immunity. First, as discussed in argument A, *supra*, the Muckleshoot Tribal Court has jurisdiction over the dissolution proceeding between the Plaintiff and Mrs. Turpen. Second, even if this Court disagrees with the Tribal Court, judicial immunity would still bar the claims against the Defendant Tribal Court Judges because, like in *O'Neil*, it would be an imperfect application of the complex body of law governing tribal jurisdiction. *Cf. Cnty. of Lewis v. Allen*, 163 F.3d 509, 513 (9th Cir. 1998) (Tribal jurisdictional disputes are "[t]he most complex problems in the field of Indian Law."); *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 849 (9th Cir. 2009) ("We have held repeatedly that determining the scope of tribal

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court jurisdiction is not an easy task."). Thus, judicial immunity bars all claims against the Defendant Tribal Court Judges.

CONCLUSION

For the reasons explained above, Plaintiff's motion for summary judgment should be denied.

Respectfully submitted, this 3rd day of April, 2023.

I certify that this memorandum contains 2,796 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I certify that on April 3, 2023, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all parties registered to receive such notice.

/s/ Trent S.W. Crable
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